IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,	)
	)
v.	)
	)
RAESHAUN GODWIN,	)
(ID. No. 0410015738)	)
	)
Defendant.	)

Submitted: March 20, 2007
Decided: July 24, 2007

Stephen E. Smith, Esq., Department of Justice, Dover, Delaware. Attorney for State.

Jeffrey S. Welch, Esq., Wilmington, Delaware. Attorney for Defendant.

Upon Consideration of Defendant's
Appeal From Decision of The Court of Common Pleas
AFFIRMED

VAUGHN, Resident Judge

State v. Raeshaun Godwin
ID. No. 0410015738
July 24, 2007

OPINION

Raeshaun Godwin ("the defendant") appeals his August 7, 2006 conviction for Driving Under the Influence after a jury trial in the Court of Common Pleas.

FACTS

There was only one witness at trial, the arresting police officer. His testimony supports the following facts. On the evening of October 10, 2004, Officer Turner was traveling westbound on Rt. 8 behind a vehicle driven by the defendant. Officer Turner observed defendant's car swerve to the right, almost hitting a curb on the right-hand side of the road. Officer Turner continued to follow the defendant's vehicle as the defendant made a right-hand turn onto Kenton Road, northbound. Officer Turner testified that as defendant made the turn he crossed a yellow line in the center of the road which separated the north and south bound lanes of Kenton Road, entering the southbound lane. The vehicle then corrected itself back to the north bound lane. The officer then turned on his patrol car lights and stopped the defendant. He approached the defendant's automobile and explained why he had stopped the defendant. While talking with the defendant, the officer smelled alcohol on the defendant's breath. The officer asked the defendant where he was coming from and if had anything to drink. The defendant responded that he was coming from the Touchdown Lounge and that he had a couple of drinks while he was there.

The officer administered six DUI field tests to the defendant. The defendant failed the finger dexterity test, the one-leg stand test, and the walk and turn test. Following the tests, the defendant was placed into custody and taken to the police station. An intoxilyzer test registered a blood alcohol level of .137.

Prior to the start of trial in the Court of Common Pleas, the defendant filed two motions. The first was a motion to suppress, in which he contended that there was no reasonable and articulable suspicion of criminal activity to stop his vehicle. The trial court denied the defendant's motion, finding that there was "reasonable and articulable suspicion to stop the defendant's vehicle for improper right turn violation of 21 *Del. C.* § 4152 or careless driving or inattentive driving in violation of 21 *Del. C.* § 4176.[1]" The second motion was a motion to dismiss. The defendant argued that the State withheld discovery. In this motion, the defendant had requested a videotape from the State prior to his previous trial in the Justice of the Peace Court. The trooper could not find the tape on the date of trial in Justice of the Peace Court and believed that it had been taped over. The trial was continued and the trooper finally discovered the video and turned it over to the defendant. The defendant argued that the delay in producing the tape is grounds for dismissal. The trial court denied this motion stating that it was without merit. The trial court does note in its Opinion that the State has an obligation to provide the defendant with pretrial discovery. In this case, however the defendant had the tape for approximately six months before the trial in the Court of Common Pleas. The trial court held that, because the trial was *de novo* and there was no evidence of bad faith on the part of the State, it did not preclude the defendant from having a fair trial in the Court of Common Pleas.

CONTENTIONS OF THE PARTIES

The defendant contends that (1) a video of the trooper conducting the

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[1] *State v. Godwin*, 2006 Del. C.P. LEXIS 45.

Horizontal Gaze Test after the trial court ruled the results of the test inadmissible was nonetheless erroneously admitted into evidence during trial; (2) the trial court erred when it refused to give a proposed jury instruction requested by the defendant; (3) the defendant was prejudiced when the trial court limited his cross-examination of Officer Turner; (4) the trial court committed reversible error when it denied defendant's motion to suppress; (5) the trial court committed reversible error when it denied the defendant's motion to dismiss; and (6) the trial court committed reversible error when it allowed the State to impeach the defendant with a prior conviction.

The State contends that the trial court did not err in allowing the jury to view the entire video; the court properly refused to give the defendant's proposed jury instruction; appellant's failure to provide a transcript precludes a meaningful review of issues arising from the hearings on motions to suppress and dismiss; and appellant's decision not to testify at trial waived his right to appeal based on improper impeachment of the appellant.

STANDARD OF REVIEW

When addressing appeals from the Court of Common Pleas, this Court sits as an intermediate appellate court.[2] As such, its function is the same as that of the Supreme Court.[3] The court's role is to "correct errors of law and to review the factual findings of the Court below to determine if they are 'sufficiently supported by the

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[2] *State v. Richards,* 1998 Del. Super. LEXIS 454.

[3] *Baker v. Connell,* 488 A.2d 1303 (Del. 1985).

record and are the product of an orderly and logical deductive process.'"[4] If substantial evidence exists for a finding of fact, this court must accept that ruling. It must not make its own factual conclusions, weigh evidence or make credibility determinations.[5] Errors of law are reviewed *de novo.*[6] Findings of fact are reviewed only to verify that they are supported by substantial evidence.[7] The standard of review when considering the sufficiency of the evidence on an appeal is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[8]

DISCUSSION

1. Admission of the video which included the police officer conducting the Horizontal Gaze Test.

The Officer conducted a Horizontal Gaze Nystagmus Test ("HGN test") on the defendant at the site of the stop. The officer was not trained to conduct this type of test and therefore, the State did not attempt to introduce it during trial. However, the State did introduce into evidence a video taken from a camera inside the officer's

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[4] *State v. Huss,* 1993 Del. Super. LEXIS 481, at *2 (citing *Levitt v. Bouvier,* 287 A.2d 671, 673 (Del. 1972)).

[5] *Johnson v. Chrysler,* 213 A.2d 64 (Del. 1965).

[6] *Downs v. State,* 570 A.2d 1142, 1144 (Del. 1990).

[7] *Shahan v. Landing,* 643 A.2d 1357 (Del. 1994).

[8] *Dixon v. State,* 567 A.2d 854, 857 (Del. 1989); *Davis v. State,* 453 A.2d 802, 803 (Del. 1982); *see Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

vehicle. The video tape shows the field tests being administered but also shows the administration of the HGN test. When the HGN test was administered, however, the defendant had his back facing the camera. Therefore, all one sees is the pen going back and forth without any testimony or any verbal comment on the tape.

"An error in admitting evidence may be deemed 'harmless' when 'the evidence exclusive of the improperly admitted evidence is sufficient to sustain a conviction.'"[9] "Even when the 'evidentiary error is of a constitutional magnitude, the convictions may be sustained if the error is 'harmless beyond a reasonable doubt.''"[10] There was evidence that the defendant failed three of the field tests administered to him and had a BAC of 0.137 when he was brought back to the police station. If the jury had not seen the administration of the HGN test, there was still sufficient evidence to convict the defendant of the driving under the influence charge. The trial court concluded that the part of the video tape which shows the HGN test had little or no probative value and did not prejudice the defendant. I agree and conclude that any alleged error was harmless.

2. The defendant's proposed jury instruction.

The defendant requested that the following jury instruction be read to the jury:

> A "breath test" result, can be held by the Jury to be insufficient as far as Driving Under the Influence conviction.

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[9] *Zimmerman v. State,* 693 A.2d 311 (Del. 1997) *citing Nelson v. State,* Del. Supr., 628 A.2d 69 (1993).

[10] *Id. citing Nelson,* 628 A.2d at 77.

The defendant cites *Clay v. State,* 193 Ga. App. 377 (Ga. Ct. App. 1989) to support the request. The trial court determined that this was not Delaware law and denied defendant's request to read the instruction to the jury.

"The decision to give a particular jury instruction is within the sound discretion of the trial judge, and we will not reverse that decision absent an abuse of discretion."[11] "In evaluating the propriety of a jury charge, the jury instructions must be viewed as a whole."[12] "Although a party is not entitled to a particular jury instruction, a party does have the unqualified right to have the jury instructed with a correct statement of the substance of the law."[13]

The defendant cannot cite any Delaware case to support his contention that it was error not to give the requested instruction. In this state, an alcohol concentration of .08 or more within four hours of driving from alcohol in the person's system at the time of driving is, by statutory definition, a violation of the statute.[14] The requested instruction would, therefore, seem to be inconsistent with Delaware law. The trial court did not abuse its discretion when it decided not to include the requested instruction.

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[11] *Miller v. State,* 893 A.2d 937 (Del. 2006).

[12] *Russell v. K-Mart Corp.,* 761 A.2d 1 (Del. 2000), *citing Culver v. Bennett,* 588 A.2d at 1096 (Del. 1991).

[13] *Id.*

[14] 21 *Del. C.* § 4177(a)(5).

3. Limitation on cross-examination of Officer Turner.

The defendant wanted to question Officer Turner at the Court of Common Pleas trial regarding a discovery issue which arose when the case was pending in the Justice of the Peace Court. This had to do with the fact that during a portion of the pendency of the case in the Justice of the Peace Court the video tape was missing. However, the tape was found while the case was still in the Justice of the Peace Court and was available at the trial in that court as well as the trial in the Court of Common Pleas. The trial court ruled that this was a trial *de novo* and what happened in the prior court was no longer relevant. The defendant contends that the fact that the tape was "missing" for a while affects the officer's credibility.

"The test for determining whether the defendant's right to challenge a witness' credibility was violated by the trial judge's limitation on cross-examination is to 'look to the cross-examination permitted to ascertain (1) if the [trier of fact] was exposed to facts sufficient for it to draw inferences as to the reliability of the witness and (2) if defense counsel had an adequate record from which to argue why the witness might have been biased.'"[15] In this case, the fact that the video was missing but was then produced is not evidence of bias against the defendant on the part of the officer. The trial court's refusal to allow evidence of this discovery problem in the Justice of the Peace Court in the trial in the Court of Common Pleas was not error.

The defendant also contends that the trial court committed error by not

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[15] *Dalton v. State,* 514 A.2d 413 (Del. 1986) *citing Weber v. State,* Del. Supr., 457 A.2d 674, 682 (1983).

permitting him to cross-examine the officer regarding a statement that the officer allegedly made at the Justice of the Peace Court while the case was pending there, a statement to the effect that "if we don't get him this time, we'll get him next time."

Issues not raised in the trial court shall not be heard on appeal.[16] I have reviewed the transcripts of the trial and the hearing on the defendant's motions to suppress and dismiss, and I find no mention of the quoted phrase in those parts of the record. There does not appear to be any record in the transcripts of the hearing or the motions that the defendant desired to cross-examine the officer on that point. There is a brief mention of it in paragraph five of the defendant's ten page motion to dismiss, but there is nothing in the record to suggest that the point was pursued. I conclude that this point was not fairly presented to the trial court nor ruled upon by it. Therefore, it will not be considered on appeal.

4. The defendant's motion to suppress.

The defendant filed a motion to suppress, arguing that Officer Turner lacked reasonable and articulable suspicion to stop defendant's car. He also contends, if there was reasonable and articulable suspicion to stop, there was no probable cause to arrest.[17]

Officer Turner testified that he witnessed the defendant's car swerve toward

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[16] *Wilmington Trust Co. v. Conner*, 415 A.2d 773 (Del. 1980).

[17] It is noted that the defendant did not file the transcript of the suppression motion or the motion to dismiss until he filed his reply brief. This deprived the State of the opportunity to discuss the suppression hearing issue as there was no record when the State filed its answering brief. Nonetheless, I will address the issue on the merits.

the right side of the road then pull back, and then swerve to the left over the line in the middle of the road after making a right turn. The officer then activated his emergency lights and pulled over defendant's vehicle. When he walked up to the defendant's car, the defendant told him that he had been at a bar drinking with some friends. The officer could also smell alcohol on defendant's breath. The officer then conducted six field sobriety tests, of which the defendant failed three. He then had defendant blow into a Portable Breathalyzer Test ("PBT"), which tests his approximate blood alcohol level, and he failed. Defendant was then arrested and taken to the police station.

An officer may detain an individual if he has a reasonable and articulable suspicion of criminal activity.[18] A reasonable and articulable suspicion is defined as an "officer's ability to 'point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.'"[19] Reasonable suspicion "must be evaluated in the context of the totality of the circumstances as viewed through the eyes of a reasonable, trained police officer in the same or similar circumstances, combining objective facts with such an officer's subjective interpretation of those facts."[20] It "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the

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[18] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

[19] *Jones v. State*, Del. Supr., 745 A.2d 856, 861 (1999) (quoting *Terry*, 392 U.S. at 21).

[20] *Id.*

evidence....”[21]

Here, the officer testified that he observed the defendant swerve to the right, almost striking a curb, and, shortly thereafter, swerve across the centerline after making a right turn. These observations of irregular driving are sufficient to create a reasonable and articulable suspicion that the defendant has committed or is committing a traffic violation. I find that the trial court's decision that the officer possessed a reasonable and articulable suspicion of a traffic violation was not error.

“In determining whether probable cause existed, courts are required to determine whether the totality of the circumstances presented reveal that ‘based upon their observations, their training, their experience, their investigation, and rational inferences drawn therefrom, the police possessed a quantum of trustworthy factual information, sufficient in themselves to warrant a man of reasonable caution to conclude that probable cause existed to believe’ that the defendant committed the offense.”[22] The defendant failed three of the six field tests and failed the PBT test. The defendant smelled of alcohol and told the officer that he had been drinking. Looking at the totality of the circumstances, the trial court's conclusion that the officer had probable cause to arrest the defendant was not error.

5. The defendant’s motion to dismiss.

The defendant contends that the State failed to produce the video taken from

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[21] *Woody v. State*, Del. Supr., 765 A.2d 1257, 1263 (2001).

[22] *State v. Smith,* 2006 Del. C.P. LEXIS 34 *citing State v. Maxwell,* 624 A.2d 926 (Del. 1989).

the officer's car while the case was pending in the Justice of the Peace Court. The trial judge denied the motion to dismiss because the defendant was receiving a trial *de novo* and the video tape had been produced to him approximately six months before his trial.

"10 *Del. C.* § 9571 clearly mandates *de novo* review of decisions from the Justice of the Peace Court."[23] "The statute requires that the parties begin anew, as if proceedings in the lower court never took place."[24]

The trial court was correct when it ruled to deny the motion. In the Court of Common Pleas parties start anew and therefore, anything that happened in the Justice of the Peace Court was properly not considered.

6. The defendant's prior conviction as impeachment.

Defendant contends that the trial court erred when it ruled that the State would be permitted to impeach the defendant with a prior conviction if the defendant testified. Under D.R.E. 609(a) a party may impeach a witness with a prior felony "only if the crime (1) constituted a felony under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect or (2) involved dishonesty or false statement, regardless of the punishment."[25] The defendant's prior felonies, second degree assault and possession of a deadly weapon by a person prohibited, are not crimes of

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[23] *Church v. Cottman,* 1998 Del. Super. LEXIS 396.

[24] *Id.* at *7.

[25] D.R.E. 609 (a).

dishonesty and therefore, the balancing test was required. However, the Supreme Court has held that in order to "raise and preserve for review the claim of improper impeachment with a prior conviction a defendant must testify."[26] Defendant did not take the stand during trial and therefore, he has failed to preserve this issue for appeal.

Accordingly, the decision of the Court of Common Pleas is ***affirmed.***[27]

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File

[26] *Miller v. State,* 893 A.2d 937 (Del. 2006).

[27] The State filed a motion to strike portions of the appellant's reply brief. Since the judgment below is being affirmed, it is not necessary to address this motion.